

**FORM FOR USE IN APPLICATIONS
FOR HABEAS CORPUS UNDER 28 U.S.C. § 2254**

RECEIVED

James Edward Gary Jr. 2007 DEC 11 A 9:26
Name

A.I.S. 222516
Prison Number

DEBRA P. HACKETT, CLERK
U.S. DISTRICT COURT
MIDDLE DISTRICT ALA

Donaldson Correctional Facility, 100 Warrior Lane, Bessemer
AL 35023
Place of Confinement

United States District Court Middle District District of _____

Case No. 3:07-CV-1074-WKW
(To be supplied by Clerk of U. S. District Court)

James Edward Gary Jr., PETITIONER
(Full Name) (Include name under which you were convicted)

Kenny Jones, RESPONDENT
(Name of Warden, Superintendent, Jailor, or authorized person
having custody of Petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF Alabama

_____, ADDITIONAL RESPONDENT.

(if petitioner is attacking a judgement which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. §2255, in the federal court which entered the judgment.)

**PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN
STATE CUSTODY**

INSTRUCTIONS--READ CAREFULLY

- (1) This petition must be legibly handwritten or typewritten and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

The Judicial Conference of the United States has adopted, effective 1/1/83, the 8½ x 11 inch paper size standard for use throughout the federal judiciary and directed the elimination of the use of legal size paper. All pleadings, etc. filed after 12/31/82 must be on 8½ x 11 inch paper, otherwise we cannot accept them.

- (2) Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) Upon receipt of a fee of \$5 your petition will be filed if it is in proper order.
- (4) If you do not have the necessary filing fee, you may request permission to proceed in forma pauperis, in which event you must execute the declaration on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.
- (6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.
- (7) When the petition is fully completed, the original and two copies * must be mailed to the Clerk of the United States District Court whose address is:

P.O. Box 711
Montgomery, Alabama 36101

- (8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

***If you are proceeding in forma pauperis, only the original petition needs to be filed with the Court.**

PETITION

1. Name and location of court which entered the judgment of conviction under attack Lee County Alabama Circuit Court
2. Date of judgment of conviction August 4, 2005
3. Length of sentence Life without Sentencing Judge John V. Denson II

4. Nature of offense or offenses for which you were convicted: Capital
Murder

5. What was your plea? (check one)

(a) Not guilty (☒)

(b) Guilty (☐)

(c) Nolo contendere (☐)

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____

6. Kind of trial: (Check one)

(a) Jury (☒)

(b) Judge only (☐)

7. Did you testify at the trial? Yes (☐) No (☒)

8. Did you appeal from the judgment of conviction? Yes (☒) No (☐)

9. If you did appeal, answer the following:

(a) Name of court Alabama Court of Criminal Appeals

(b) Result Affirmed Conviction

(c) Date of result April 20, 2007

If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: Filed for Writ of Certiorari to the Alabama Supreme Court in which Certiorari was denied on July 13, 2007

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes (☐) No (☒)

11. If your answer to 10 was "yes", give the following information:

(a) (1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes (☐) No (☐)

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No ()

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of Court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No ()

(5) Result _____

(6) Date of result _____

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:

(1) First petition, etc. Yes () No ()

(2) Second petition, etc. Yes () No ()

(3) Third petition, etc. Yes () No ()

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. As to all grounds on which you have previously exhausted state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted all your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not check any of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

- A. Ground one: Petitioner was denied his Constitutional Right to Assistance of An Attorney while being interrogated
Supporting FACTS (tell your story briefly without citing cases or law):

Gary argues that he repeatedly asserted his right to Counsel during the interrogation and the interrogating officer's disregarded his repeated assertions and continued the interrogation and obtained incriminating statements.

See Attached Brief

- B. Ground two: Petitioner's Conviction was obtained by a Violation of the Privilege against Self-incrimination.
Supporting FACTS (tell your story briefly without citing cases or law):

Gary argues that the State violated his right against Self-incrimination when the interrogating officer's continued interrogating him in custody without Counsel present after he invoked his right to Counsel and obtained incriminating statements that were admitted into evidence and used against Gary to obtain a conviction.

- C. Ground three: _____

Supporting FACTS (tell your story briefly without citing cases or law):

D. Ground four: _____

Supporting FACTS (tell your story briefly without citing cases or law):

[illegible]

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal state briefly what grounds were not so presented, and give your reasons for not presenting them: _____

[illegible]

14. Do you have any petition or appeal now pending in any court, wither state or federal, as to the judgment under attack? Yes () No (✓)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing _____

(b) At arraignment and plea Richard K. Kieth 22 Scott St, Montgomery AL 36104; Daniel G. Hamm 560 S. McDonough St, Ste-A, Montgomery AL 36104

(c) At trial Richard K. Kieth & Daniel G. Hamm

(d) At sentencing Richard K. Krieth & Daniel G. Hamm

(e) On appeal Richard K. Kiehl & Daniel G. Hamm

- (f) In any post-conviction proceeding Richard K. Kieth & Daniel G. Hamm
- (g) On appeal from any adverse ruling in a post-conviction proceeding: Richard K. Kieth & Daniel G. Hamm

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes () No (✓)

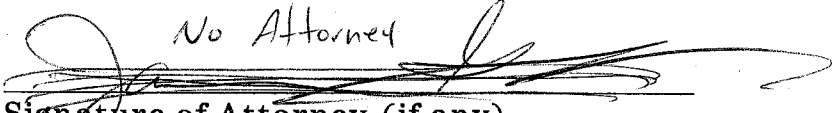
17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes (✓) No ()

(a) If so, give name and location of court which imposed sentence to be served in the future: Russell County Circuit Court in Phenix City Alabama

(b) And give date and length of sentence to be served in the future: March, 2002 30 Year Sentence.

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes () No (✓)

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

No Attorney

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on November 29, 2007.
(date)


Signature of Petitioner

JAMES EDWARD GARY, JR.)

APPELLANT/DEFENDANT,)

VS.)

STATE OF ALABAMA,)

APPELLEE/RESPONDENT.)

Case # CC-2002-492

3:07-CV-1074-WKW

COMES NOW THE PETITIONER, JAMES EDWARD GARY, JR., RESPECTFUL-
LY MOVES THIS HONORABLE COURT TO GRANT HIS PITITION AND SET
ASIDE THE STATE OF ALABAMA COURTS AFFIRMANCE OF THE APPELLANT'S
CONVICTION AND REMAND HIS CASE TO THE TRIAL COURT WITH INSTRUCT-
IONS DIRECTING THE TRIAL COURT TO SUPPRESS HIS STATEMENTS FROM
BEING ADMISSIBLE AS ^{Evidence} ~~EVIDENCE~~.

[REDACTED]

GARY ARGUES THAT THE STATE COURTS DECISION IS IDENTICAL TO THE STATE COURTS DECISION IN HART V. ATTORNEY GENERAL. WHERE IN HART THE STATE COURTS DECISION THAT HARTS STATEMENT MADE DURING CUSTODIAL INTERROGATION WAS ADMISSIBLE WHEN HE DID NOT MAKE AN UNEQUIVOCAL REQUEST FOR COUNSEL WAS CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW BECAUSE THEY FAILED TO DETERMINE WHETHER HART'S WAIVER WAS VOLUNTARY, KNOWING AND INTELLIGENT PURSUANT TO MIRANDA. SEE HART V. ATTORNEY GENERAL, 323 F.3d 884(11th Cir. 2003).

PRIOR TO GARY'S TRIAL GARY MOVE TO SUPPRESS HIS INCRIMINATING STATEMENTS BECAUSE HE CONTENDS THAT HE REQUESTED AN ATTORNEY DURING THE CUSTODIAL INTERROGATION. LEE COUNTY CIRCUIT COURT RELIED ON DAVIS V. U.S., TO DENY GARY'S MOTION TO SUPPRESS. SEE Exhibit A. AS EVIDENCE BY THE TRANSCRIPT. LEE COUNTY CIRCUIT COURT CONCLUDED THAT PETITIONER'S STATEMENT MADE DURING THE CUSTODIAL INTERROGATION WAS ADMISSIBLE WHEN HE DID NOT MAKE AN UNEQUIVOCAL REQUEST FOR COUNSEL WAS CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW. SEE HART V. ATTORNEY GENERAL. LEE COUNTY CIRCUIT COURT CONVICTED PETITIONER IN WHICH THE PETITIONER APPEALED THE CONVICTION TO THE ALABAMA COURT OF CRIMINAL APPEALS. THE ALABAMA COURT OF CRIMINAL APPEALS AFFIRMED THE LEE COUNTY CIRCUIT COURTS CONVICTION. PETITIONER THEN FILED APPLICATION FOR REHEARING ON MAY 11, 2007. THE ALABAMA COURT OF CRIMINAL APPEALS OVERRULED THE APPLICATION FOR REHEARING ON MAY 18, 2007. PETITIONER THEN FILED FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT IN WHICH CERTIORARI WAS DENIED ON JULY 13, 2007.

NEITHER DID THE CIRCUIT COURT NOR THE APPEAL COURTS DETERMINE WHETHER GARY IN FACT MADE A VOLUNTARY, KNOWING AND INTELLIGENT WAIVER PURSUANT TO MIRANDA. PETITIONER NOW FILES WRIT OF HABEAS CORPUS UNDER 28 U.S.C. §2254.

GROUND AWHETHER GARY INVOKED HIS RIGHT TO COUNSEL DURING CUSTODIAL INTERROGATION?

MIRANDA WARNING STATES! "YOU HAVE A RIGHT TO REMAIN SILENT. ANYTHING YOU SAY CAN BE USED AGAINST YOU IN COURT. YOU HAVE A RIGHT TO A LAWYER FOR ADVICE BEFORE WE ASK ANY QUESTIONS AND TO HAVE HIM WITH YOU DURING QUESTIONING. IF YOU CANNOT AFFORD A LAWYER ONE WILL BE APPOINTED FOR YOU BEFORE ANY QUESTIONING IF YOU WISH. IF YOU DECIDE TO ANSWER QUESTIONS NOW WITHOUT A LAWYER PRESENT YOU WILL STILL HAVE THE RIGHT TO STOP ANSWERING AT ANY TIME. YOU ALSO HAVE THE RIGHT TO STOP ANSWERING AT ANY TIME UNTIL YOU TALK TO A LAWYER."

PETITIONER ARGUES THAT HE ~~REPEATEDLY~~ ^{Repeatedly} EXPRESSED HIS DESIRE FOR THE ASSISTANCE OF ATTORNEY AFTER HE SIGNED THE MIRANDA WAIVER SEE EXHIBITS. D.D1.D2.D3.D4. AS EVIDENCE BY THE TRANSCRIPT. PETITIONER ARGUES THAT HIS MOTION TO SUPPRESS HIS STATEMENTS WAS DENIED BASED UPON AN "OPINION" THAT HE MADE AN EQUIVOCAL REQUEST FOR COUNSEL. THERE ARE TWO DIFFERENT INTERPRETATIONS OF WHAT WAS SUPPOSEDLY SAID BY GARY ON THE VIDEOTAPE. SEE EXHIBIT D.D1.D2.D3. AS EVIDENCE BY THE TRANSCRIPT. THERE ARE TWO DIFFERENT INTERPRETATION BECAUSE IT WAS UNDISPUTED THAT GARY'S CONVERSATIONS ON THE VIDEOTAPE WAS DIFFICULT TO HEAR. SEE EXHIBIT E. AS EVIDENCE BY THE TRANSCRIPT. STATES PROSECUTOR MR. GLANZER EXPLAINED IN HIS OWN WORDS THAT GARY'S CONVERSATION ON THE VIDEO-TAPE WAS MORE DIFFICULT TO HEAR THAN THE INTERVIEWER AND WHY. IF GARY'S CONVERSATION ON THE VIDEOTAPE IS DIFFICULT TO HEAR THEN HOW COULD THE PROSECUTOR SAY IF GARY MADE AN EQUIVOCAL

REQUEST FOR COUNSEL OR NOT? NO ONE WAS SURE IF GARY ~~SAID~~ SAID I OR Y'ALL WHEN HE MADE HIS ASSERTION FOR COUNSEL, BUT IT IS A FACT THAT EVERYONE HAD DETERMINED THAT GARY DID SAY SOMETHING ABOUT TALKING TO HIS LAWYER. THE TRIAL COURT DID NOT SET OUT IT'S FINDINGS OF FACT PERTAINING TO THEIR DECISION THAT GARY MADE AN EQUIVOCAL REQUEST FOR COUNSEL. SEE EXHIBIT N. ~~IT~~ IT WAS UNDISPUTED THAT GARY'S CONVERSATION ON THE VIDEOTAPE WAS DIFFICULT TO HEAR. SO NOW THERE IS TWO DIFFERENT INTERPRETATIONS OF WHAT WAS ONLY THOUGHT TO HAVE BEEN SAID BY GARY ON A VIDEOTAPE THAT'S DIFFICULT TO HEAR.

GARY ARGUES THAT ALTHOUGH HE DID SAY "I WANT" TO TALK TO MY LAWYER, THE STATE'S INTERPRETATION OF WHAT WAS REPEATEDLY SAID BY GARY ON THE VIDEOTAPE IS STILL SUFFICIENTLY CLEAR ENOUGH FOR ANY "REASONABLE" OFFICER TO INTERPRET AS BEING AT THE LEAST AN EXPRESSION OF A DESIRE FOR THE ASSISTANCE OF AN ATTORNEY.

THE UNITED STATES SUPREME COURT HAS HELD THAT WHEN A PERSON UNDERGOING A CUSTODIAL INTERROGATION "INDICATES IN ANY MANNER AT ANY TIME PRIOR TO OR DURING QUESTIONING THAT HE WISHES TO REMAIN SILENT, THE INTERROGATION MUST CEASE." MIRANDA V. ARIZONA, 384 U.S. 436, 473 (1966). THE SUPREME COURT FURTHER ~~REMAINED~~ ^{Expanded} AND DELINEATED MIRANDA BY REQUIRING THAT A SUSPECT MUST UNAMBIGUOUSLY REQUEST COUNSEL. DAVIS V. U.S., 512 U.S. 452. THE TERM UNAMBIGUOUSLY DOES NOT REQUIRE A SUSPECT TO USE ANY PARTICULAR WORD ORDER OR CHOICE TO EFFECTIVELY MAKE A REQUEST FOR COUNSEL. THE COURT IN DAVIS STATED: "ALTHOUGH THE SUSPECT NEED NOT SPEAK WITH DISCRIMINATION OF AN "OXFORD DON" HE MUST ARTICULATE HIS DESIRE TO HAVE COUNSEL PRESENT SUFFICIENTLY CLEARLY THAT A REASON-

ABLE OFFICER IN THE CIRCUMSTANCES WOULD UNDERSTAND THE STATEMENT TO BE A REQUEST FOR AN ATTORNEY. WHILE OFFICERS HAVE NO OBLIGATION TO STOP QUESTIONING IF THE SUSPECTS STATEMENT IS AMBIGUOUS OR EQUIVOCAL. THE SUSPECT ASSERTIONS IN A REQUEST FOR COUNSEL MUST BE "AT A MINIMUM SOME STATEMENT" THAT CAN BE REASONABLY CONSTRUED TO BE AN "EXPRESSION OF A DESIRE" FOR THE ASSISTANCE OF AN ATTORNEY. MCNEIL V. WISCONSIN, 501 U.S. 171, 178 (1991).

THE TERM UNAMBIGUOUSLY DOES NOT REQUIRE A SUSPECT TO USE ANY PARTICULAR WORD ORDER SUCH AS "I" OR "Y'ALL" TO EFFECTIVELY MAKE A REQUEST FOR COUNSEL. THE UNITED STATES SUPREME COURT HAS HELD THAT THE SUSPECT NEED NOT SPEAK WITH DISCRIMINATION OF AN OXFORD DON. THE SUSPECT ASSERTION IN A REQUEST FOR COUNSEL MUST BE "SOME STATEMENT" THAT CAN BE "REASONABLY INTERPRETATED." THE DEFINITION OF REASONABLE SIMPLY STATES: 1. HAVING SOUND JUDGMENT, 2. WISE, 3A. NOT EXCESSIVE OR EXPENSIVE, B. TOLERABLE." GARY ARGUES THAT ANY "REASONABLE" OFFICER WOULD BE ABLE TO INTERPRET HIS REPEATED STATEMENT. GARY CONTENDS THAT HE NEVER MADE A STATEMENT TO SGT. JACKSON ABOUT CONTINUING THAT INTERROGATION AND HE NEVER SAID "NO" I DON'T WANT A LAWYER OR "I THINK" I WANT A LAWYER AS HELD IN DAVIS V. U.S., GARY REPEATEDLY MADE CLEAR FIRM STATEMENTS TO SGT. JACKSON ABOUT WANTING TO TALK TO HIS LAWYER IN WHICH AT ONE POINT SGT. JACKSON RESPONDED "ALRIGHT WELL YOU JUST SIT HERE MAN IT'S GONNA BE A WHILE." CLEARLY SHOWING THAT HE DID UNDERSTAND THAT GARY WAS EXPRESSING HIS DESIRE FOR THE ASSISTANCE OF AN ATTORNEY. AT THAT POINT THE INTERROGATION SHOULD HAVE BEEN CEASED. SGT. JACKSON MADE NO

MOVE TO TERMINATE HIS ENCOUNTER WITH GARY, INSTEAD SGT. JACKSON TOOK IT UPON HIMSELF TO DISHONOR GARY'S REQUEST AND INITIATED FURTHER CONVERSATION WITH GARY WHEN HE TOLD GARY THAT HE WOULD LIKE TO SHOW HIM SOMETHING. SEE EXHIBITS D1, D2. AS EVIDENCE BY THE TRANSCRIPT.

IF SUSPECT INVOKED HIS RIGHT TO REMAIN SILENT AND POLICE INTERVIEWING SUSPECT FAILED TO SCRUPULOUSLY HONOR THAT RIGHT SUSPECTS CONFESSION MUST BE SUPPRESSED IN A SUBSEQUENT CRIMINAL PROSECUTION. U.S. V. RAMBO, 365 F.3d at 907.

AN ACCUSED HAVING EXPRESSED HIS DESIRE TO DEAL WITH THE POLICE ONLY THROUGH COUNSEL IS NOT SUBJECT TO FURTHER INTERROGATION BY THE AUTHORITIES UNTIL COUNSEL HAS BEEN MADE AVAILABLE TO HIM. A VALID WAIVER OF THAT RIGHT CANNOT BE ESTABLISHED BY SHOWING ONLY THAT HE RESPONDED TO FURTHER POLICE---INITIATED CUSTODIAL INTERROGATION, EVEN IF HE HAS BEEN ADVISED OF HIS RIGHTS. EDWARDS V. ARIZONA, 451 U.S. at 484, 68 L.Ed 2d 378, 101 S.Ct.(pg. 644) 1880.

MIRANDA WARNING IN ITSELF STATES: IF YOU DECIDE TO ANSWER QUESTIONS NOW WITHOUT A LAWYER PRESENT (MEANING IF THE ACCUSED SIGNS THE WAIVER) YOU WILL STILL HAVE THE RIGHT TO STOP ANSWERING AT ANY TIME. YOU ALSO HAVE THE RIGHT TO STOP ANSWERING AT ANYTIME UNTIL YOU TALK TO A LAWYER (MEANING AFTER THE ACCUSED SIGNS THE WAIVER, THE ACCUSED STILL HAVE THE RIGHT TO REQUEST COUNSEL AND CEASE THE INTERROGATION AT ANYTIME DURING THAT INTERROGATION UNTIL COUNSEL IS MADE AVAILABLE TO HIM IN ORDER TO PROTECT HIS RIGHT AGAINST SELF-INCRIMINATION).

A SUSPECT MAY WAIVER HIS OR HER RIGHT TO HAVE COUNSEL PRESENT DURING CUSTODIAL INTERROGATION AND ONCE A VALID WAIVER OF THAT RIGHT IS GIVEN THE POLICE ARE FREE TO INTERROGATE THE SUSPECT "UNTIL" SUCH TIME AS "HE OF SHE" MAY SUBSEQUENTLY "ASSERT THE RIGHT TO COUNSEL." ONCE A SUSPECT INVOKES THE RIGHT TO COUNSEL AND THE POLICE INITIATE FURTHER CUSTODIAL INTERROGATION WITHOUT COUNSEL PRESENT THE SUSPECTS SUBSEQUENT STATEMENTS MADE WITHOUT HAVING HAD ACCESS TO COUNSEL "DO NOT" AMOUNT TO A VALID WAIVER AND HENCE ARE INADMISSIBLE. SOFFAR V. JOHNSON, 237 F.3d AT 413.

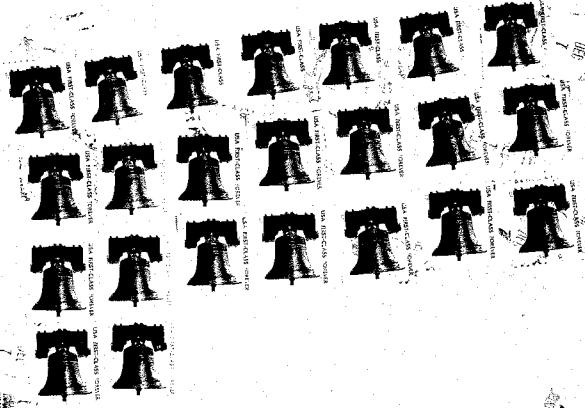
CONCLUSION

IN THE VERY BEGINNING OF THE INTERROGATION GARY SIGNED THE MIRANDA WAIVER WHICH AT THAT PARTICULAR TIME MADE HIS WAIVER VOLUNTARY, BUT LATER ON DURING THAT SAME INTERROGATION AFTER GARY HAD SIGNED THE MIRANDA WAIVER GARY "REPEATEDLY" EXPRESSED HIS DESIRE FOR THE ASSISTANCE OF AN ATTORNEY SUFFICIENTLY CLEAR ENOUGH FOR SGT. JACKSON AND ANY REASONABLE OFFICER TO UNDERSTAND WHICH MADE GARY'S WAIVER INVOLUNTARY.

RELIEF SOUGHT

ALL INCRIMINATING STATEMENTS MADE BY GARY AFTER HE ASSERTED HIS RIGHT TO COUNSEL AND WAS DENIED THAT RIGHT ARE DUE TO BE SUPPRESSED AND THE CONVICTION RESULTING FROM THOSE INCRIMINATING STATEMENTS VACATED.

James C. Day, Jr.
100 Warrior Lane
Bessemer, AL 35023 C-25



TEET LHP 4000 CTSE 4002

The Clerk of the United States District Court
PO Box 711
Montgomery, Alabama 36101

Exhibits

Exhibit - A

58

THE COURT: Okay. I haven't seen your copy.

MR. HAMM: If we could provide that prior to the Court making a decision?

THE COURT: All right.

MR. KEITH: We've got one, Judge, I've just written on mine as well for today's hearing. We can get one here pretty quick.

THE COURT: I'll follow along with the State's. You want me to sit over here and watch this, is that what you intend to do?

MR. GLANZER: When we get to that point. We might add too that as far as the law that might assist the Court in reviewing the tape, our contention is that at one time obviously Miranda was controlling, strict Miranda, and if there's any reference to a lawyer that usually triggered the, I guess the right to an attorney. That later progressed to if it was an equivocal statement where the law enforcement officer couldn't tell whether he was invoking or not, there became a requirement to pursue what he meant by that last statement. The Davis case which the State is relying on in this has progressed that one step further and said if it's equivocal then unless it's clear to law enforcement based on their experience and

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Exhibit D

33

1 mean, do you know what I am saying, that's
2 just -- that's it. That's what it is. That is what
3 it is. So if this is why y'all got me shackled up

4 --

5 VAN JACKSON: Yep. Because today is the day.

6 JAMES GARY: Today is the day for what?

7 VAN JACKSON: Where you are going to have to face the music.

8 What I'm telling you right now is that this
9 thing is going the distance today. It's going
10 the distance. It's over with. And my only
11 hope is that you are going to tell the truth.

12 JAMES GARY: Well, only hope. Y'all are saying y'all got
13 me on this, I might as well stop talking now
14 and y'all talk to my lawyer because I'm telling
15 you, man, I ain't had no dealings with that man
16 in no kind of way as far as he got me out on
17 bond and worried the shit out of me about that
18 money, man. As far as that, that's it. That's it.
19 do you know what I am saying, if you know
20 what I'm saying, you saying you gonna put

Exhibit D1

34

1 something like that on me, then you might as
2 well talk to my lawyer then, and it's just that
3 because it ain't me, bro. Now, I promise you
4 and that's the honest to God truth, and I'll put
5 that on my momma, and she's been dead
6 thirteen years.

7 VAN JACKSON:

All right. Well, you just sit here, man. It's
8 gonna be a while. Like I said, it's gonna be a
9 while. But you know, I would like to show
10 you something.

11 JAMES GARY:

Show me. Show me. I would like to see.

12 VAN JACKSON:

13 Well, you know, I hate for somebody to make
14 a decision to not tell the truth and that they
15 suffer for the rest of their life, and it's a big
16 decision. That's a big choice.

17 JAMES GARY:

18 Man, you can talk to my lawyer, man.
19 Because I'm telling you I ain't got nothing to
20 do with no shit like that, man. That's on
everything, man. Everything. My children.
Everything, man. I ain't got shit to do with no

[REDACTED]

bit shoot some dice you know what I'm saying but as far as that I ain't gonna do nothing like that man. That's the honest to God truth man. I'm telling you that's the truth I mean you know what I'm saying that's just that's it that what it is. So if this is why ya'll got me shackled up?

Jackson: Yep cause today is the day.

Gary: Today is the day for what?

Jackson: When you gonna have to face the music. What I'm telling you right now is that this thing is going to go the distance today. Its going the distance its over with and my only hope is that you are going to tell the truth.

Gary: Well only hope is ya'll saying if ya'll got me on this I might as well stop talking now and ya'll talk to my lawyer cause I'm telling you man I ain't had no dealings with that man in no kinda way as far as he got me out on bond and worried the shit out of me about that money man as far as that that's it. That's it you know what I'm saying. If you know what I'm saying, you saying you gonna put something like that on me then I want to talk to my lawyer then and its just that cause it ain't me bro now I promise you and that's the honest to God truth and I'll put that on my mama and she's been dead 13 years.

Jackson: Alright. Well you just sit here man its gonna be a while like I said its gonna be a while _____

Gary: Show...show... I would like to see it.

Exhibit D-3

Jackson: Well you know I hate to see somebody make the decision to not tell the truth and that they suffer for the rest of their life and it's a big decision. That a big choice.

Gary: I want to talk to my lawyer man cause I'm telling you I didn't do know shit like that man. That's on everything man. Everything. My children everything man. I ain't got shit to do with no shit like that. I do my thing true enough but I ain't fixin to do nothing like that I ain't fixin to go no distance you know what I'm saying to do nothing. Now this you know what I'm saying its obvious everybody know its there its out there in the open. I got to go to Court for it now but as that is as far as I'm gonna go. Far as you talking about killing somebody ain't no way in the world I'll kill nobody, specially no children and I know for a fact I ain't killed no children. You keep hollering about two people got killed, that man and that child, that's them two people. But ya'll ain't fixing to put that on me cause I know I been in jail.

Jackson: Oh no. We're not trying to put that on you. Like I told you that case right there we know you didn't have nothing to do with that.

Gary: Well what you talking about two people murdered?

Jackson: This happened to two people that's in Opelika and this was before this happened with this little kid and this man. That's what we talking about.

Gary: I'm telling you I ain't been to Opelika man. I ain't been to Opelika for nothing.

Jackson: Do you want me to tell you?

Exhibit D-4

38

1 other than that, talk to my lawyer. I would like
2 to see it, though.

3 (Pause was had.)

4 (Jackson left and entered.)

5 VAN JACKSON:

6 Now, this isn't it. This isn't everything, but
7 I'm going to collect this stuff right here
8 because what we're talking about is so serious
9 that I think that you really need to think about,
10 you know, what we are talking about and
11 reading the paper or trying to take your mind
12 away from it, this is -- this is about you. This
13 is about the future for you, and you need to
14 think about what I'm talking to you about.
15 That's one thing, but I'm still getting you
16 another thing that's going to, you know, show
17 you how important this is.

18 (VAN JACKSON LEFT.)

19 (MR. TAYLOR ENTERED THE
20 ROOM.)

HEATH TAYLOR:

How are you doing?

Exhibit E.

54

1 talk to my lawyer. There is another statement
2 that was made where the State insists that he
3 says y'all can talk to my lawyer. We think it's
4 quite clear from the tape where it says I want
5 to talk to my lawyer. So there are a couple of
6 discrepancies, Judge, on the critical statements
7 and there are a number of different
8 transcriptions of the other non-critical
9 portions of the suppression that we really
10 weren't too concerned about but on the critical
11 parts those were --

12 THE COURT: Yeah, two in particular were pointed
13 out by the State.

14 MR. GLANZER: Judge, if I could, it's probably
15 something we ought to resolve before we get into
16 it, we believe it would be helpful for the Court
17 to follow along with the transcript as it goes.
18 The way the room is set up the actual camera and
19 microphone are in a thermostat within this room,
20 and that thermostat is on the far wall from the
21 Defendant. So his conversations, although
22 pretty well clear are more difficult to hear
23 than the interviewer who is closer to the
24 camera. And in situations like that in front of
25 juries normally what the State would do would be
6 prepare the transcript, hand it out to the jury

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Exhibit, N

y'all talk to my lawyer because I'm telling you, man, I ain't had no dealings with that man in no kind of way as far as he got me out on bond and worried the shit out of me about that money, man.

(R. 484, law enforcement transcription, and R. 944, Transcript of Suppression Hearing.)

The second statement whose language is not disputed but whose meaning is at issue is as follows:

"Jackson: Well I'm telling you man. We been working on it and uh we were trying to provide you an opportunity to tell your side and uh that's why I wanted to talk to you, to give you that opportunity and uh you know if you want to continue to and these boys are putting everything on you and if you continue to not tell the truth about what happened then I want you to know exactly what your up against cause everybody is saying you did it. Other people out there that don't know you was saying you was with them and uh....

"Gary: Uh, show me what you got to show me, other than that, talk to my lawyer. I would like to see it, though."

(R. 488-89, law enforcement transcription, and R. 948, Transcript of Suppression Hearing.)

The record shows that the trial court viewed the videotaped statement. (Pursuant to the ore tenus rule, it was up to the trial court to resolve the alleged discrepancies between what the parties said was the specific language used in the disputed statements. Although the trial court did not specifically set out his findings of fact, for reasons discussed below, the court had to have found that Gary said "y'all talk to my lawyer" instead of "I want to talk to my lawyer," as Gary, in his motion to suppress, contended was actually said. Based on our review of the evidence, we cannot say that the trial court's determination was clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence.

